

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS

477

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23315

ROBERT L. FIELDS, ET ALS

Appellants

vs.

DISTRICT OF COLUMBIA GOVERNMENT

and

ARTHUR E. MORRISETTE

Appellees

Appeal From the United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 18 1969

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UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 23315

ROBERT L. FIELDS
LILLIAN G. WHEELER FIELDS
EUGENE E. HOWLEY
REBECCA T. HOWLEY
ELLA V. BASS
WALTER E. PATTERSON
ELSIE M. PATTERSON
ALTHEA HOWARD, et al,
etc.

Individually and on behalf of other
property owners in Square 5806 as
may be affected by the conveyance to
Ella Barnard, et als as recorded in
Liber 787 at folio 362.

Appellants

vs.

DISTRICT OF COLUMBIA GOVERNMENT
and
ARTHUR E. MORRISETTE

Appellees

Appeal from the United States District Court For
The District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, Section 1291 of the United States Code (1964 ed.) to review the action of the District Court in this proceedings. The Court below denied the relief prayed in the complaint, instituting the action, and entered a final order from which this appeal is taken.

STATEMENT OF THE CASE

The appellants are all property owners with property abutting on a right of way established by deed, dated June 23, 1875, said deed having been made by one Catharine A. Talburtt to one Ella H. Barnard. The right of way is over a strip of land 16 feet wide and running from a point on Nichols Avenue for approximately 670 feet to what was at that time private property, but what is today Talbert Terrace (Pl. Ex. 1). The deed provides that the strip of land is granted to a group of property owners as tenants in common for a private roadway leading to Nichols Avenue and for no other purpose whatsoever (Pl. Ex. 5).

For more than 75 years the property owned by the appellants enjoyed the use of this right of way and the use of the right of way was never challenged by anyone prior to January 1964, when the defendant Arthur E. Morrisette, acquired title to the 16 foot strip by a tax deed from the District of Columbia (Tr. 45) (Ex. 18). Prior to his acquisition of this 16 foot strip, the defendant Morrisette had acquired a large parcel of property adjoining this strip on the other side from the plaintiff's property. The defendant Morrisette plans to build an apartment complex of the garden type on the property.

In plans approved by the District of Columbia, the defendant, Morrisette proposes to use portions of the 16 foot strip as parking places (P. Ex. 19) and erecting certain curbing and retaining obstructions across portions of said private roadway.

When the District had finally approved the plans, after the defendant Morrisette had lost two bids before the Board of Zoning Adjustment, it was at this point that the appellants filed their complaint for injunctive relief.

The Court below on action for a preliminary injunction denied the appellants motion for a preliminary injunction in a hearing where the Court refused the appellants request for oral testimony and where the transcript demonstrated how utterly confused the Court was (Tr. of Motion).

At the trial of the case on its merits, the Court in a highly contradictory opinion and judgment (R. ____) upheld the validity of appellants easement but immediately destroyed its effectiveness by permitting the appellee Morrisette to encroach on the 16 foot strip under some pretext that this was a benefit to the appellants. It is from this ambivalent decision that the appellants appeal.

STATEMENT OF POINTS RELIED UPON ON APPEAL

1. The Court erred in refusing to rule that an easement by grant was an absolute right and could not be eroded by non-use or substitution.

2. The Court erred by its ambivalent judgment in upholding easement in one breath, while at the same time destroying same by its application.

3. The Court's judgment actually deprives the appellants of their property without due process of law.

4. The Court erred in striking appellants objection to appellee's proposed order for the reason given (R. ____).

5. The Court was so disabled by a hearing defect that he became irritable, frequently did not hear the testimony and finally became so upset when appellants refused his suggested compromise, that the appellants were denied a fair trial.

6. The Court erred in dismissing complaint against the District of Columbia.

SUMMARY OF ARGUMENT

It has been universally held that an easement granted by deed cannot lapse by non use. Such an easement become a vested property right and the owner thereof cannot be divested of it without due process of law.

The findings of fact and the judgment entered thereon are masterpieces of ambivalence. The trial judge on the one hand pontifically upholds the validity of the appellants easement and then sets about to make it worthless by permitting its use by the appellee in a manner inconsistent with the context of the easement.

It is elementary that to compel one to give up something which is his, without his consent and without sanction of law, is taking property without due process of law.

For a Court to strike a pleading from the record simply because the Court disagreed with counsels terminology, which was not scandalous and was supported by the record, clearly shows arbitrariness and caprice on the part of the trial Court which taints his judgment.

Unfortunately, this trial, highly technical as it was, came before the trial Court when the Court has lost much of his pristine sharpness, and was beset with a severe hearing defect, which made it necessary for him to frequently ask the clerk what a witness had said. The trial Court further demonstrated his pique when appellants refused to accept the Court's suggested compromise. The appellants were thus denied a fair trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO RULE THAT AN EASEMENT BY GRANT WAS AN ABSOLUTE RIGHT AND COULD NOT BE ERODED BY NON-USE OR SUBSTITUTION.

It has been universally held that, unlike an easement by custom, an easement by deed cannot be lapsed by non use or substitution. In this case the appellant's claims are bottomed upon a deed which has been in existence since 1865. There is no evidence that this right was ever challenged until the defendant Morrisette came into the picture about 89 years after the creation of the right. The appellants claim is based upon a duly recorded deed and it must be presumed that the defendant Morrisette knew the nature of the estate which he acquired when he acquired the 16 foot strip by a tax deed. *ENGEL vs. CATUCCI*, 91 U.S. App. D.C. 541 197 F 2nd 597 (1952).

II. THE COURT ERRED BY ITS AMBIVALENT JUDGMENT IN UPHOLDING THE EASEMENT IN ONE BREATH, WHILE AT THE SAME TIME DESTROYING SAME BY ITS APPLICATION.

Even the most casual reading of the judgment (R. ____) will demonstrate its contradictory character. How the Court can recognize the validity of the easement and then compel the appellants to accept some other right, strains the credulity of counsel for the appellants. See McDONALD vs. WELBORN, 220 S.C. 10, 66 S.E. 2d 327 (1951).

III. THE COURT'S JUDGMENT ACTUALLY DEPRIVES THE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The judgment of the Court violates the constitutional rights of the appellants in that it takes their property without due process of law. Even when the Government in the exercise of eminent domain takes a citizens property, it must give just compensation. Here these appellants property rights with respect to their unrestricted use of their property is handed over to a private citizen gratis. U.S. CONSTITUTION, 4th and 14th Amendments.

IV. THE COURT ERRED IN STRIKING APPELLANTS OBJECTION TO APPELLEES PROPOSED ORDER.

The trial Court's action in striking appellants objection to appellees proposed order because counsel referred to tactics of appellee as "strong arm tactics." The record is replete with justification for such a statement (Tr. Vol. 2, pages 95, 96, 97 & 98).

The record discloses that appellee had barricaded the end of the right of way; had caused tons of dirt to be dropped in appellant Patterson's path and finally told appellant Patterson that he, Morrisette, was closing the road and that he, Patterson, would have to go out another way. If these were not strong arm methods -- I should like to know how one would describe them. To say that this was intemperate language and then hook it up with appellants refusal to accept an offer which they felt was inimical to their best interests, rather demonstrates the bias of the Judge.

V. THE TRIAL COURT WAS SO DISABLED BY A HEARING DEFECT, THAT HE BECAME SO IRRITABLE AND UPSET THAT HE FREQUENTLY ASKED THE CLERK WHAT A WITNESS HAD SAID -- THAT AS A RESULT, THE APPELLANTS WERE DENIED A FAIR TRIAL.

It is fundamental under our system of jurisprudence that the trier of the facts should be in possession of all of his faculties to an extent that he can be aware of what is going on. Unfortunately, in spite of his sharpness in prior years, the trial judge had become so infirm and so deaf that he could not hear counsel if he left the lectern--no matter how loud he spoke. Although there was amplification on the witness stand, the Court frequently in the course of the trial asked the clerk what the witness had said. No litigant would have been required to accept a juror whose hearing was as bad as the trial judge's hearing was. This physical defect, together with his testiness when the appellants refused to accept a compromise, all tend to show that the appellants were deprived of a fair trial by the trial Court. As further evidence of the judge's wrath, in his oral findings he announced that the judgment would be without costs against either party (Tr., Vol. A-8), yet in his final judgment in his own handwriting, he assessed costs for each defendant against the plaintiffs.

VI. THE TRIAL COURT ERRED IN DISMISSING COMPLAINT AGAINST THE DISTRICT OF COLUMBIA

The complaint averred and the testimony showed that the District of Columbia was about to issue a building permit to the defendant, Morrisette, even after Morrisette had lost two encounters before the Board of Zoning Appeals. The District of Columbia also having been the grantor in the tax deed in 1964 (Pl. Ex. 18) to Morrisette, are deemed to know the nature of the property sold by it to Morrisette.

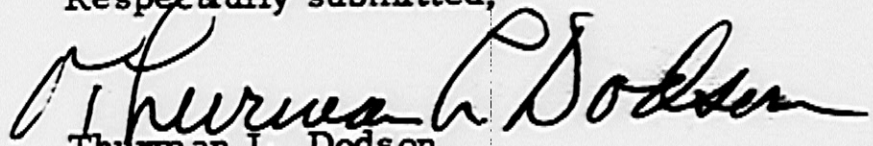
Yet, notwithstanding this knowledge, one of the plaintiffs was advised by an official of the District of Columbia that they would issue a building permit, notwithstanding the fact that the plans showed that the parking spaces were on the 16 foot right of way. This official further advised the appellant Fields that they would issue the permit so long as the applicant had title to the ground and that they were not concerned with private covenants. Under these circumstances, it would seem that

the District of Columbia was not only a proper party, but a necessary party. To dismiss against the District of Columbia was palpably erroneous.

CONCLUSION

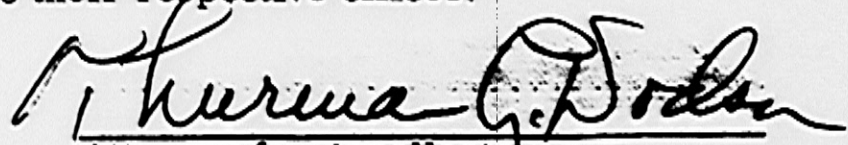
In view of the foregoing, it is respectfully urged that the judgment below be reversed and that judgment be entered in favor of the appellants.

Respectfully submitted,


Thurman L. Dodson
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Appellants were mailed this 8th day of October 1969 to Richard J. Hopkins, Esquire, Attorney for plaintiff Wilfred F. Mitchell; Thomas C. Bell, Esquire, Attorney for the District of Columbia; and to Joel C. Wise, Esquire, Attorney for Arthur E. Morrisette, to their respective offices.


Thurman L. Dodson
Attorney for Appellants

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23315

ROBERT L. FIELDS, ET AL, *Appellants*

v.

DISTRICT OF COLUMBIA
and
ARTHUR E. MORRISSETTE, *Appellees*

On Appeal From the United States District Court for the
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7 Moore's Federal Practice, 65.04 (i) pp. 1629-1630	9
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* Cases chiefly relied upon are marked with asterisks.

STATEMENT OF QUESTIONS PRESENTED*

The questions presented by this appeal are:

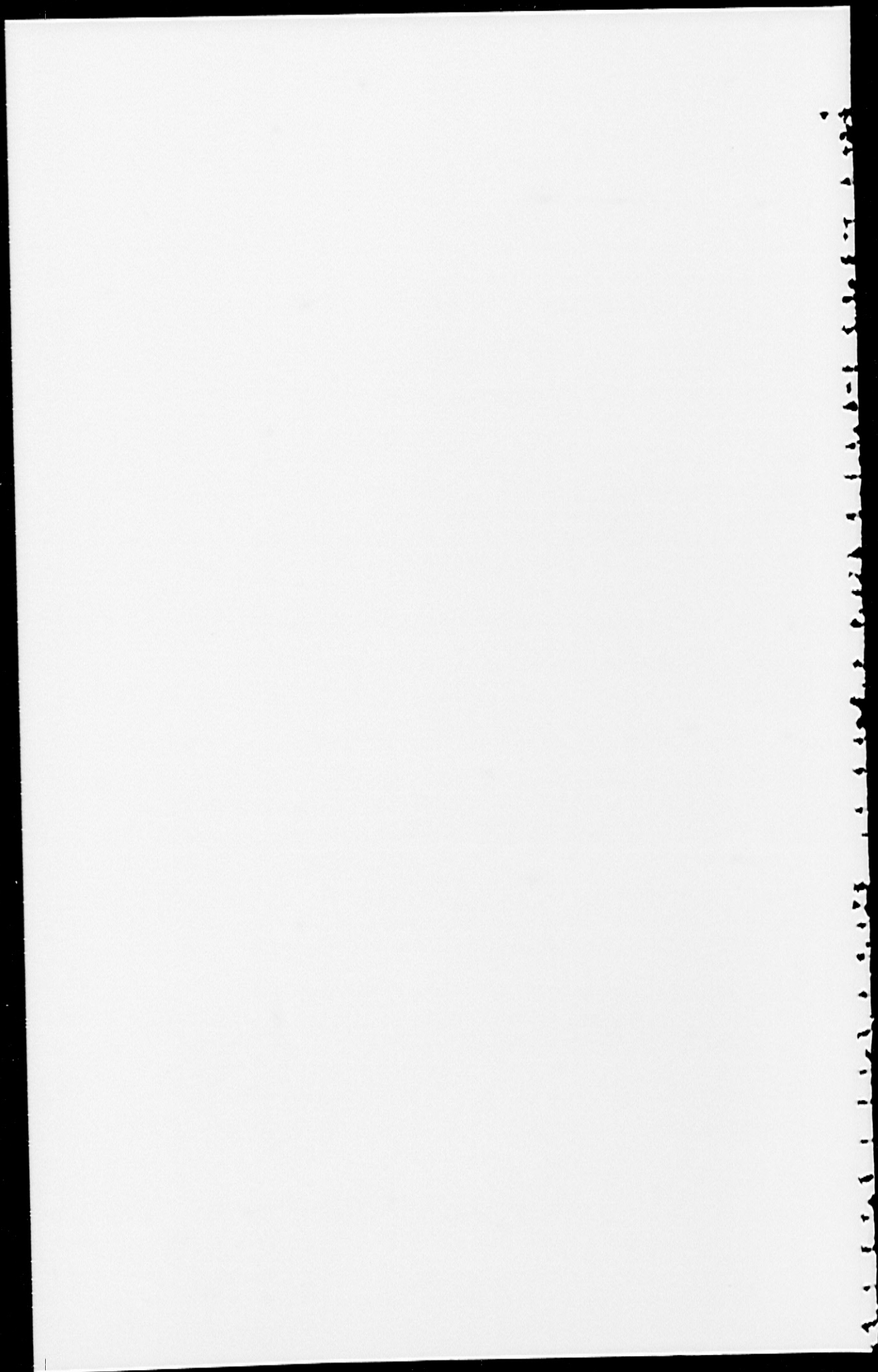
Whether the court below erred in dismissing the complaint of appellants?

Whether the proposed apartment project, when completed, will interfere with or prevent appellants from their joint use, in common with appellee, Morrisette, to use the 16 foot access roadway to Nichols Avenue, S.E., Washington, D. C.?

Whether the decision of the court below is an equitable benefit to appellants rather than an infringement on their rights to the joint use of the roadway as an exit to Nichols Avenue, S.E., Washington, D. C.?

Whether the possible parking of seven motor vehicles on the 16 foot roadway widened to 23 feet can be deemed to cause permanent irreparable injury to appellants?

* This case has not previously been before this Court.



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On Appeal From the United States District Court for the
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BRIEF FOR APPELLEE

I. STATEMENT OF THE CASE

Appellee, Morrisette, is the owner in fee simple of a certain lot in the southeast section of the District of Columbia, known as Lot 70, Square 5869, as per plat recorded in the Office of the Surveyor of the District of Columbia in Book 153, Page 84. The lot, the subject of this appeal, was formerly known as Parcel 231/5, Square 5869. Appellee, Morrisette, acquired fee title to said Parcel 231/5, Square 5869 from the District of Columbia by Deed dated December 31, 1963, said Deed was recorded in Book 12147 at Page 322.

The real properties of appellants, except appellant, Althea Howard, front on Talbert Street, S.E., Washington, D. C., and the rear of said real properties abut Parcel 231/5, Square 5869. The property of appellant, Althea Howard, fronts on Nichols Avenue with the side yard abutting the Parcel in issue. Appellants are successors in title from one Catherine A. Talburtt.

By Deed dated June 23, 1875, recorded in the land records of the District of Columbia on June 25, 1875, in Liber 787 at Folio 362 one Catherine A. Talburtt conveyed a strip of land 16 feet wide and 676½ feet long to Ella H. Barnard, et al. The Deed provided as follows:

"To have and to hold the said strip or parcel of ground and appurtenances unto the said parties hereto of the second part their heirs and assigns as tenants in common and not as joint tenants as and for a private roadway leading to said Nichols Avenue and for no other purpose whatever reserving however to the said Louisa C. Talburtt her heirs and assigns the full right of way use and benefit of said ground and of any part thereof as a roadway as aforesaid in common with said parties hereto of the second part their heirs and assigns."

Parcel 231/5, Square 5869, is the same parcel conveyed to Ella H. Barnard et al and is the subject of this appeal.

Appellee, Morrisette, the owner in fee of said Parcel 231/5, Square 5869 also is the owner in fee of a large parcel of land adjacent to said parcel and running from Nichols Avenue to Talbert Terrace and Talbert Street.

This land is zoned for multifamily use and Mr. Morrisette intends to erect thereon a low to moderate income housing project as provided for under the National Housing Act. Appellants are opposed to the use of the land as a rental housing project.

Application was made to the Department of Licenses and Inspections for the District of Columbia for a building per-

mit. The District of Columbia approved the application and are prepared to issue a building permit.

The site plan approved by the District of Columbia provides for the widening of the 16 foot private roadway to 23 feet in width for approximately 350 feet in length from Nichols Avenue. The driveway was intended to service two project parking lots containing 63 parking spaces. The site plan also indicated the parking of seven cars along said roadway. The remaining length of the said private roadway, except for a slight encroachment of a retaining wall 550 feet from Nichols Avenue, will remain undisturbed.

The roadway has not been used as an access to Nichols Avenue by any of appellants for over seventy-five (75) years and is overgrown with vegetation and large trees. Appellant, Patterson, has used the roadway as a limited access to a public alley which is parallel to his property and abuts the private roadway in question.

Due to years of non use and to the grading of Talbert Terrace, a public street, it is a physical impossibility to exit from the roadway to Talbert Terrace. The slight encroachment of the retaining wall into the 16 foot private roadway is approximately 150 feet from Talbert Terrace and does not interfere with any of appellants' use of the 16 foot private roadway as an access road to Nichols Avenue as provided for in the original conveyance dated June 23, 1875.

In the preparation of the site plan for the housing project, the rights of appellants to use the 16 foot private roadway in common with appellee, Morrisette, were recognized and the project was planned to improve their position and not to restrict their legal rights. Appellants, Howard and Patterson will benefit by the project because they will have access to Nichols Avenue by the joint use of a paved 23 foot roadway to Nichols Avenue. The right of appellants, Fields, Howley and Bass, will not be disturbed and will remain in its present condition except for the slight en-

crossment which will not interfere with their exit rights to Nichols Avenue.

The court below, sitting as a Court of Equity, dismissed the complaint and imposed certain conditions upon appellee, Morrisette, which guarantees to appellants permanent protection of their rights to use the 16 foot private roadway leading to Nichols Avenue, S.E., Washington, D. C. From the equitable judgment of the court below appellants appeal.

II. SUMMARY OF ARGUMENT

This cause of action was for injunctive relief and that the court below was bound by the laws and rules of equity.

The decision of the court below was an equitable decision which not only protected the legal rights of appellants, but imposed additional requirements upon appellee, Morrisette, to further protect the rights of appellants.

Appellants failed to produce any evidence to support their claim of permanent and irreparable injury to their rights to use in common with appellee, Morrisette, the 16 foot private driveway.

The District of Columbia was not a proper party defendant and its dismissal by the court below was not in error. Appellants in the trial of the case failed to produce any evidence of any wrong doing by the District of Columbia.

III. ARGUMENT

In support of this appeal, appellants allege that the court below erred in refusing to rule that an easement by grant was an absolute right and could not be eroded by non-use or substitution. Appellees did not make an issue of the rights of appellants to use the roadway in common with appellee, Morrisette. The defense of abandonment and non-use was a defense against alleged damages claimed by appellants (Tr. pages 2, 6, 23, and 24).

The only issue before this court is whether or not the proposed housing project would deny or interfere with ap-

pellants' rights to use the roadway in common with appellee, Morrisette, as an exit to Nichols Avenue, S.E., Washington, D. C.

Appellants sued to enjoin appellees from obtaining a building permit for the construction of the contemplated low-rent housing project and alleged that the proposed housing project would cause permanent and irrevocable damage to their joint use of the 16 foot roadway. The roadway widened to 23 feet is essential to the project in order to service the two parking areas for ingress and egress of the tenants who will occupy the project when completed. Appellee, Morrisette, agreed and the court ordered that appellants be granted an easement over the entire 23 foot roadway. The opinion of the court (App. 1) and the court order (App. 2) support this contention.

Appellants cited the case of *Engel v. Catucci*, 91 U.S. App. D.C. 541, 197 F.2d 597 (1952) to support their appeal. In this case the court held that an easement appurtenant is not extinguishable by a sale and conveyance of land subject to it for non-payment of a tax assessed against such land. The question before this court does not concern the validity of the easement.

Appellants allege in support of their appeal that the court erred by its ambivalent judgment in upholding the easement in one breath, while at the same time destroying same by its application. The court in its judgment did uphold the validity of the easement. The validity of the easement was not in issue. Appellee, Morrisette, admitted to its validity.

Appellants sued for a permanent injunction to prohibit the issuance of a building permit alleging that the proposed housing project would prevent their uninterrupted use of the easement in common with Mr. Morrisette. After hearing all the evidence and examining the exhibits, the court sitting as a Court of Equity, held that the proposed improvements would benefit appellants rather than cause them

permanent irreparable damage. The court required appellee, Morrisette, to grant to appellants an easement over the 23 foot roadway and to relocate the seven parking spaces so as not to interfere with appellants' access to the said roadway.

Appellants cite *McDonald v. Welborn*, 220 S.C. 10, 16 S.E. 2nd 327 (1951) in support of this contention. The cited case has no bearing whatsoever on the issue at Bar. The *Welborn* case involved an attempt to convert certain lots, in a subdivision restricted to residential use, to commercial use. The court held that the restrictive covenants were valid and the injunction was valid. The existence of the easement in the subject case is not in issue.

Appellants allege that the decision of the Court below was in violation of their constitutional rights. The taking of property without due process of law is a limitation on the Sovereign and is not applicable in disputes between private citizens. In any event appellants had their day in court.

Appellants allege that the court erred in striking appellants' objection to the proposed order. Although the court did strike appellants' objection to the proposed order, it did not adopt the proposed order, but corrected it to conform with its opinion.

Appellants allege that the trial court was incompetent and because of the physical disabilities of the court, they were deprived of a fair trial. An examination of the record will disclose that counsel for appellants did not raise any objection to the conduct of the court. No actions were taken, or motions made to disqualify the Judge and no objections were made to any of his rulings. Appellants, through counsel, submitted to the jurisdiction of the court, without objection, and are now estopped from appealing on the grounds so alleged. The discrepancy between the written opinion of the court and the order of the court regarding cost is of no consequence since appellee is not claiming

any cost in the action below. *Douglass v. U. S.*, 197 A.2d 447 (1964).

Appellants allege that the trial court erred in dismissing their claim against the District of Columbia. In the subject case appellants sought an injunction against Mr. Morrisette and the District of Columbia to enjoin Mr. Morrisette from obtaining a building permit and against the District of Columbia from issuing a building permit. The District of Columbia was an unnecessary party since an injunction against Mr. Morrisette would have given to appellants complete relief. Appellants failed to introduce any evidence of any wrong doings by the District of Columbia, or any deviations, or failures by the District of Columbia in compliance with zoning and other rules and regulations of the Department of Licenses and Inspections. Courts will not substitute their judgment or interfere with administrative decisions unless it can be shown that such decisions were arbitrary and capricious. So long as Mr. Morrisette met the requirements of the Department of Licenses and Inspections, the District of Columbia was required to issue the building permit.

The only issue before this Court is whether or not the court below erred in denying appellants' claim for a permanent injunction against appellees in the issuance and the obtaining of a building permit to develop a multifamily housing project on the land owned by Mr. Morrisette.

Appellants claimed in their petition that the proposed housing project, if completed, would interfere permanently with their joint use of a 16 foot roadway in common with Mr. Morrisette.

In order to sustain the action for a permanent injunction, it was necessary for appellants to establish by a preponderance of the evidence that the construction of the proposed housing project would cause appellants irreparable and permanent injury. Appellants failed to produce the testimony and evidence sufficient to support their claim.

The court below, sitting as a Court of Equity, after hearing the testimony and examining the numerous exhibits, found that the proposed project would, in fact, be beneficial to appellants and would not cause them irreparable damage. The court dismissed the complaint and, sitting as a Court of Equity, did grant equitable relief to appellants by requiring appellee, Morrisette, to grant to appellants an easement over the 23 foot driveway and to relocate the seven parking spaces so as not to interfere with access rights to the roadway by appellants.

Appellants did obtain a temporary restraining order but were denied their claim for a preliminary injunction (App. 3). The law applicable to temporary injunction is equally applicable to permanent injunction.

Temporary restraining orders and preliminary injunctions are extraordinary remedies and this court has set out the criteria upon which such relief must be based. In *National Lawyers Guild v. Brownell*, 96 U.S. App. D.C. 252, 254, 225 F.2d 552 (1955), the rule was enunciated as follows:

"A motion for a preliminary injunction requires the court to determine whether there are substantial questions and whether there would be irreparable injury to one party or the other, and to balance the equities between the parties."

Similarly, in *Embassy Dairy v. Camalier*, 99 U.S. App. D.C. 367, 211 F.2d 41 (1954), it was said:

"Whether or not a preliminary injunction should issue is ordinarily a matter for the discretion of the District Court to be exercised upon this series of estimates: 'the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.'" Citing *Communist Party v. McGrath*, D.C. 1951, 96 F.Supp. 47, 48 (Concurring opinion).

Under the above-cited authorities, appellants are clearly not entitled to equitable relief herein.

It is said in 7 Moore's Federal Practice, 65.04(i) pp. 1629-1630, and the citations thereunder, that:

"The applicant for a preliminary injunction has the burden of showing a right to injunctive relief; and, * * * that irreparable injury will result if the injunction is not granted."

Appellants, accordingly, have the burden of proving that the criteria enumerated by the Court of Appeals are met herein.

The basis for injunctive relief in the Federal Courts has always been irreparable harm and inadequacy of legal remedies.

The original grant conveyed the 16 foot strip as a private roadway leading to said Nichols Avenue and for no other purpose whatsoever reserving to Grantor the right to use the roadway in common with said Grantee. Mr. Morrisette is the successor in title from the Grantee and appellants are the successors of the Grantor. As set forth in the testimony and in the opinion of the court below, it is a physical impossibility to use the roadway as an exit to Nichols Avenue due to its non-use for over seventy-five (75) years. The proposed improvement by Mr. Morrisette is beneficial to appellants, and the improvements cannot be held to cause irreparable damage to appellants.

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity had distinguished it. *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S. Ct. 587 (1944).

An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. The historic

injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. *Meredith v. Winter Haven*, 320 U.S. 228, 235, 64 S. Ct. 7, 11 (1943).

It has always been the rule that the power to issue injunctions is an extraordinary one which should be used with moderation, and then only in a clear and unambiguous case. *Leland v. Morin*, 104 F. Supp. 401 (1952).

It is to be noted that appellants did not file a joint appendix as required by the Federal Rules of Appellate Procedure.

IV. CONCLUSION

The court below was not in error in dismissing appellants' claim and the decision must be affirmed.

Respectfully submitted,

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APPENDIX

[Filed May 9, 1969]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2476-68

ROBERT L. FIELDS, ET AL., *Plaintiffs*

v.

DISTRICT OF COLUMBIA GOVERNMENT and
ARTHUR E. MORRISSETTE, *Defendants*

Opinion

Thurmond L. Dodson of Washington, D. C. for the plaintiffs.

Thomas C. Bell, Assistant Corporation Counsel, for the defendant District of Columbia Government. Joel C. Wise, of Washington, D. C. for the defendant Arthur E. Morrisette.

This is an action for an injunction against interference with an easement or a right of way. The action is brought by a group of property owners. The rear of their property faces the right of way. The defendants are the District of Columbia and a property owner, who has acquired the fee simple to the strip over which the plaintiffs have an easement and has also acquired a parcel of property on

the other side of the roadway, on which he proposes to build an apartment house of the garden type as it is known in real estate parlance.

The right of way was created by a grant contained in a deed dated June 23, 1875 made by one Catherine A. Talburt to E. H. Barnard. The right of way is over a strip 16 feet wide and running from a point on Nichols Avenue for approximately 670 feet to what was at that time private property but what is today Talbert Terrace. The deed provides that the strip of land is granted to a group of property owners as tenants in common for a private roadway leading to Nichols Avenue and for no other purpose whatever.

The right of way or roadway is perhaps a misleading and somewhat grandiose term to describe the 16 foot strip over which the easement exists. Running from Nichols Avenue to Talbert Terrace this strip is on a very sharp incline and forms in effect a precipice, the result being that it is impossible to drive a motor vehicle through the strip all the way from Nichols Avenue to Talbert Terrace. Plaintiffs' principal witness admitted on cross-examination that he never drove a car all the way across the right of way, even though he did drive an automobile. In addition the strip is overgrown with vegetation. There are grass, weeds, shrubbery and a number of large trees at various spots along the right of way. Moreover, through the years unknown persons have dumped dirt, debris, trash and the like at various points. The result is that the right of way is of very limited usefulness. It cannot be used for a continuous drive from one end to the other. Some portions of it have been used for limited purposes and that is all.

No attempt has been made by the plaintiffs or their predecessors, so far as the evidence shows, to clear any part of the right of way or to improve it in any way. Needless to say, it goes without saying that it is not paved and it is not even covered with gravel or small stones but is in a natural state. Nevertheless, the right of way exists

over all of this strip and the plaintiffs must be deemed to have an easement of passing and repassing over it. No taxes have been paid on this strip since 1889. Several years ago the defendant Morrisette acquired a large parcel of property adjoining this strip on the other side from the property of the plaintiffs and plans to build an apartment house of the garden type as has been stated. He has also acquired the 16 foot strip by a tax deed made by the Commissioners of the District of Columbia on January 11, 1964. He has been granted permits to build the apartment house in question.

His project comprises also in addition to constructing the building, a widening of the 16 foot strip to 23 feet and paving most of it except a comparatively short section immediately adjoining Talbert Terrace. He proposes to place a number of parking spaces in the roadway in order to comply with the requirements of the District of Columbia that builders of apartment houses must supply a certain number of parking spaces for their tenants. Other parking spaces are to be supplied on other portions of the property not involved here.

It is clear that the plaintiffs will be directly benefited by this improvement because the strip that was heretofore practically impassible will become a paved roadway practically all the way through, and naturally they will have the advantage of that improvement. The plaintiffs raise several objections, however, claiming that there are certain infringements of their easement by the proposed plans. The defendant proposes to broaden the roadway from 16 feet to 23 feet, adding to the 16 foot strip an additional strip which is part of his property. In those parts, however, of the proposed roadway that are to be devoted to parking spaces, since the parking spaces will take up 9 feet in width, the strip will be narrowed to 14 feet and that is claimed to be an encroachment on the easement. Technically that is correct. The defendant in turn, however,

offers to confer upon the plaintiffs a right to use the entire 23 foot strip in lieu of their existing 16 foot strip.

The Court finds, however, that the entrance to two of the properties which today have an entrance on the 16 foot strip, namely property owned by the plaintiff Howard and property owned by the plaintiff Patterson, would be interfered with by the proposed parking spaces and the resulting narrowing of the passageway to 14 feet. There should be a sufficient shifting of the parking spaces proposed to be placed in the roadway in order not to interfere with the ingress and egress to these two pieces of property.

It is also claimed that a retaining wall which the defendant proposes to construct at the Talbert Terrace end of the 16 foot strip will encroach on it for several feet. The Court regards this as *de minimis* because there is no exit from the 16 foot strip to Talbert Terrace, there never has been and there is not intended to be. No actual or practical interference with the plaintiffs' rights would exist by reason of the retaining wall.

The plaintiffs have shown, as has just been indicated, that the defendant's project includes within its contemplation some encroachments on the easement possessed by the plaintiffs, an easement which by the way no one has ever fully used. However, as has been held time and time again, equity traditionally does not grant an injunction such as is prayed for here for purely technical or minor violations of someone's rights. Equitable considerations must play a major part in determining whether equitable relief should be granted. Equity jurisprudence differs from the law side of the courts, where it is sufficient to establish a technical violation of a right. This principle was summarized and applied some years ago by the Supreme Court in *Hecht Co. v. Bowles*, 321 U.S. 321, at 329, where the Court said:

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould

each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

As a matter of equity this Court reaches the conclusion that no such plenary or general injunction as is prayed for should be granted against the defendants. The Court will dismiss the complaint on the merits as against the defendant Morrisette on condition that he make the necessary adjustment of parking spaces in the proposed roadway so as not to interfere with access to the Howard and Patterson properties and also on condition that he convey to the plaintiffs a perpetual easement to use the entire proposed roadway 23 feet wide in lieu of the original 16 foot right of way.

Insofar as the defendant District of Columbia is concerned, no cause of action has been established against it. The District of Columbia officials have not committed any act in violation of law nor is it shown that they contemplate doing so. The Building Department of the District of Columbia Government in passing upon applications for permits is not a tribunal to determine titles to property or encumbrances on property. That is left to the courts. It passes only on the question whether the proposed plans and the applications for permits conform to the law. Accordingly, the complaint will be dismissed on the merits as to the District of Columbia.

No costs will be allowed to any party.

The transcript of this oral decision will constitute findings of fact and conclusions of law. Counsel will submit a proposed judgment.

ALEXANDER HOLTZOFF
United States District Judge

May 1, 1969

[Filed May 23, 1969]

Order

This case came on for trial and the Court having heard the evidence, and the Court having made its findings of fact and conclusions of law, it is this 22nd day of May, 1969:

ORDERED and ADJUDGED, that judgment be, and the same hereby is, entered in favor of Defendants dismissing the complaint as against defendant District of Columbia; and that it be dismissed as against defendant Arthur E. Morrisette on the following conditions:

That Defendant Arthur E. Morrisette relocate the car parking spaces to provide sufficient ingress and egress to the private roadway for the use and benefit of plaintiffs Althea Howard and Walter E. Patterson; and

That defendant Arthur E. Morrisette grant to Plaintiffs an easement to use the 23 foot roadway, as shown on the site plat, and it is further

ORDERED and ADJUDGED that each defendant recover costs.

ALEXANDER HOLTZOFF

Judge

[Filed November 1, 1968]

Memorandum

This cause came on for hearing before the Court on October 16, 1968, on Motion of Plaintiffs for a Preliminary Injunction, and on Cross Motions of Defendants to vacate the Temporary Restraining Order issued on October 4, 1968, and on a motion to deny the motion of Plaintiffs.

FINDING OF FACT

1. This Court has jurisdiction over the subject matter pursuant to 11 D.C. Code 521.

2. Plaintiffs one through eight own real estate abutting a 16 foot private road now owned by Defendant Morrisette. By Deed recorded June 25, 1875, Catherine A. Talburt conveyed a private road to Ella H. Barnard, et al., as a private road leading to Nichols Avenue and reserved in herself, her heirs and assigns the right to use the private road in common with the said grantee. The private road is known and identified as Parcel 231/5 in Square 5869. Said Plaintiffs are successors in title from Catherine Talburt.

3. Plaintiff Wilfred F. Mitchell is the owner of a lot known as Lot 5-1, Square 5807, being in a subdivision known as Dexter Heights and claims an equitable interest in Lot 43, Square 5807, now owned by Defendant Morrisette, by reason of a Declaration recorded on August 18, 1942, in Liber 7783, Folio 447.

4. Defendant Morrisette applied to the Department of Licenses and Inspections in the District of Columbia for a building permit to construct 110 apartment units on Lot 70, Square 5869, which includes Parcel 231/5, Square 5869, and Lot 43, Square 5869, the subject of this action, and said Department has approved the application and is prepared to issue the building permit.

5. On October 4, 1968, Plaintiffs obtained a Temporary Restraining Order against Defendants, restraining them from issuing and obtaining the building permit.

6. Plaintiffs allege that the proposed construction will deprive them of their right to use the said roadway in common with Defendant Morrisette and that the Plaintiff Wilfred F. Mitchell will be deprived of his rights under the said Declaration to park on Lot 43.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to the provisions of 11 D.C. Code 521.

2. Plaintiffs have failed to show that the issuance of a building permit and the proposed construction will cause them irreparable injury, and that they have failed to meet the criteria to support their motion as set out by our Court of Appeals in *National Lawyers Guild v. Brownell*, 96 U.S. App. D.C. 252, 254, 225 F.2d. 552.

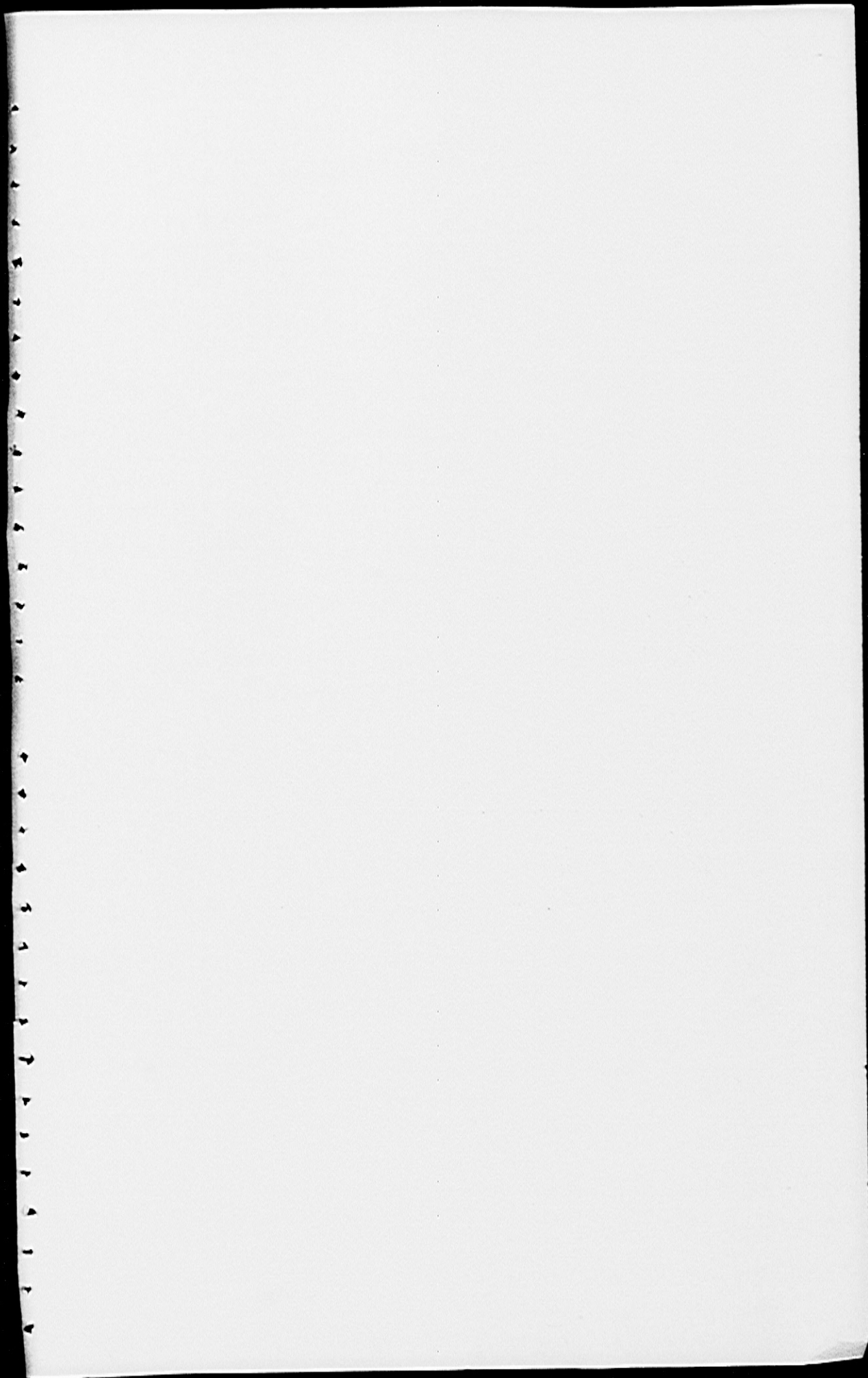
3. The Court, after examining the pleadings, the motions of the parties, and hearing oral argument of counsel, vacates the Temporary Restraining Order issued October 4, 1968, and denies Plaintiffs' Motion for a Preliminary Injunction.

ORDER

In light of the above findings of fact and conclusions of Law, it is this 1st day of November, 1968,

ORDERED, That the Temporary Restraining Order be dissolved and Plaintiffs' Motion for a Preliminary Injunction be and is hereby denied, and the cash deposit be released.

H. F. CORCORAN
Judge



BRIEF FOR APPELLEE DISTRICT OF COLUMBIA

**UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit**

No. 23,315

ROBERT L. FIELDS, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA, et al.,

Appellees.

**Appeal From The United States District Court
For The District Of Columbia**

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United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 18 1969

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 23,315

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Appellants,

v.

DISTRICT OF COLUMBIA, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did not the court, at the conclusion of the trial, properly dismiss the complaint against the District of Columbia on the ground that no cause of action was established against it?

This case has not been before the Court on any previous occasion.

REFERENCES TO RULINGS

The opinion of the District Court dismissing the complaint against the District of Columbia is not reported but is contained in Volume A of the trial transcript at pp. 1-8. /

COUNTER-STATEMENT OF THE CASE

On September 30, 1968, appellants filed in the District Court a complaint against Arthur E. Morrisette (hereinafter "the builder") and the District of Columbia (hereinafter "the District") seeking a "Declaratory Judgment of Easement, Injunction, Damages, and Other Relief" (Complaint, p. 1).¹

In their complaint appellants alleged that they are individual owners of certain lots located in the District of Columbia in the area bounded on the north by the 1200 block of Talbert Street, Southeast, and on the west by Nichols Avenue, Southeast (Complaint, pp. 1-3).

¹ Appellants have not filed, as required by Rule 30 of the Federal Rules of Appellate Procedure, an appendix to their brief. Thus, references herein are to the designated documents in the record on appeal. There is now pending before this Court a motion by the builder to dismiss the appeal for non-compliance with the rules governing appeals to this Court.

Abutting their lots in common is a 16-foot strip of land, approximately 670 feet long, extending between Nichols Avenue and Talbert Terrace, over which appellants claim an easement for a right-of-way (Complaint, p. 3; see also Tr. A, p. 2). Appellants assert that their right-of-way exists by virtue of an easement granted by a deed executed in 1875 (Complaint, p. 4; exhibit B attached to complaint).

Appellants alleged in their complaint that the builder obtained from the District title to the 16-foot strip by purchase of a tax deed in 1963 and has since limited their access to the right-of-way by erecting a steel barricade and depositing a truckload of dirt thereon (Complaint, pp. 3-4). They then alleged that the builder, having acquired other lots adjacent thereto, intends to erect apartment buildings with a parking lot extending onto portions of the 16-foot strip which will permanently interfere with their use of the right-of-way (Complaint, pp. 5-7). They alleged also that the builder, in furtherance of this plan, has applied to the District for building permits (Complaint, p. 5).

Appellants asked the court, inter alia, to permanently enjoin the District from issuing such building permits " * * * so long as his [the builder's] plans call for the utilization of the easement bound 16 foot strip alley;" that the builder be enjoined from doing any act which

would prejudice appellants' use of the right-of-way; and that the court enter a declaratory judgment decreeing the said easement to exist in their favor (Complaint, pp. 7-8).

The District answered, averring that, since the case involves a dispute over an interest in land solely between appellants and the builder, appellants can obtain complete relief by a judgment for equitable relief against the builder (District's answer).

There was adduced at trial evidence substantially as follows:

Appellant Walter E. Patterson has, since 1943, owned and lived in premises at 1225 Talbert Street, Southeast (Tr. 94-95). After obtaining in 1952 the necessary building permit from the District of Columbia government, he constructed a garage at the rear of his property, which can be entered only by traversing the 16-foot strip (Tr. 97-98).

Appellant Althea V. Howard and certain others own lots 2420, 2422, and 2424 on Nichols Avenue, Southeast, which abut on the 16-foot strip (Tr. 104). She stated that, if the builder carries out his alleged plan to erect a retaining wall at the proposed location along the 16-foot strip, ingress and egress to these properties from Talbert Street will be permanently blocked (Tr. 104).

The builder testified that he owns the 16-foot strip of land which is the subject of the case at bar, as well as certain adjoining property, upon which he plans to erect garden-type apartment buildings and a parking lot (Tr. 178-180, 185). He stated that he obtained the 16-foot strip of land by purchase in 1963 of a tax deed from the District of Columbia (Tr. 179; Builder's answer, p. 2). He stipulated as to the existence of a valid easement for a right-of-way over the 16-foot strip (which he intends to pave and widen to 23 feet), and agreed that he would guarantee in writing access over it to appellants Howard and Patterson (Tr. 122, 130, 187, 221).

Following presentation of all the evidence, the trial court

"* * * dismissed the complaint on the merits as against * * * [the builder] on condition that he make the necessary adjustment of parking spaces in the proposed roadway so as not to interfere with access to the Howard and Patterson properties and also on condition that he convey to the * * * [appellants] a perpetual easement to use the entire proposed roadway 23 feet wide in lieu of the original 16 foot right of way" (Tr. A, p. 7).

On the ground that no cause of action had been established against it, the trial court dismissed the complaint against the District (Tr. A, pp. 7-8).

This appeal followed.

ARGUMENT

The trial court properly dismissed the complaint against the District of Columbia.

The issues presented by the complaint admittedly involved "title to real estate" (Complaint, p. 2). As is apparent from the pleadings, only the appellants and the builder claim title to, or legal interest in, the 16-foot strip of land which is the subject of this dispute.

While the builder has applied to the District for building permits (Tr. 15), the District is not, for this reason, a necessary party to the action between the builder and individual citizens litigating title to, or legal interest in, the real estate involved. In an action for equitable relief, only the persons who are "materially interested in the outcome of a suit * * * or in the subject matter thereof * * *" should be made parties thereto. 43 C. J. S., Injunctions, § 173. The District's interest, if any, is certainly not a material interest in the outcome of the suit.

In Marshall v. Winter, 250 So. C. 308, 157 S. E. 2d 595, 597 (1967), one property owner sued another to require the removal of an obstruction placed across a piece of land (formerly designated a public road but since abandoned by the county) over which an easement

was claimed. In upholding the trial court's denial of defendant's motion to bring in additional parties, the court said:

"The controversy here is between plaintiff on the one hand and defendant on the other as to the right of plaintiff to use the road in question as a means of ingress and egress to his property. Only the defendant is charged with wrongfully depriving plaintiff of such right. * * *

* * * * *

"It is contended that the county should be made a party to the action only 'in order that the defendant can be reasonably assured of public maintenance of the alleged easement from the date of the order in this case, if such easement is determined to exist.' The enforcement of any obligation of the county to maintain the road is totally irrelevant to a determination of whether the defendant may lawfully deprive plaintiff of the use thereof."

There is likewise no necessity for including the District as a party to this suit.

Furthermore, the trial court held that no cause of action has been established against the District because its officials

"* * * have not committed any act in violation of law nor is it shown that they contemplate doing so. The Building Department of the District of Columbia Government in passing upon applications for permits is not a tribunal to determine titles to property or encumbrances on property * * *." (Tr. A, pp. 7-8.)

CONCLUSION

Upon the foregoing, it is respectfully submitted that the action of the District Court in dismissing the complaint against the District of Columbia was in all respects correct and in accordance with law and should, therefore, be affirmed.

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November 10, 1969

